

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID B. JOHNSON,
Petitioner,

v.
WARDEN M. MARTEL,
Respondent.

) NO. CV 10-3166-JVS (MAN)
)
)
)
) ORDER DISMISSING PETITION
) AS SECOND OR SUCCESSIVE;
) AND DENYING CERTIFICATE OF
) APPEALABILITY
)

Petitioner filed a habeas petition, pursuant to 28 U.S.C. § 2254, on April 27, 2010 ("Petition"). The Petition is the second Section 2254 habeas petition he has filed stemming from his 1999 state conviction based on a violation of California Penal Code § 422.

Under the Rules Governing Section 2254 Cases in the United States District Courts, a habeas petition filed by a prisoner in state custody "must" be summarily dismissed "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4, 28 U.S.C. foll. § 2254. For the reasons set forth below, the Petition must be, and is, DISMISSED as second or successive, pursuant to 28 U.S.C. § 2244(b) and Rule 4.

BACKGROUND

On February 7, 2003, Petitioner filed a Section 2254 habeas petition in this Court in Case No. CV 03-912-JVS (MAN) (the "First Action"). The First Action petition challenged Petitioner's conviction and sentence imposed in the Los Angeles Superior Court in 1999, for violating California Penal Code § 422 (making terrorist threats). The First Action petition raised ten habeas claims, to wit: (1) Petitioner's Fourth, Fifth, and Fourteenth Amendment rights were violated when the trial court allowed a witness to testify at trial regarding matters pertaining to a count that had been dismissed; (2) trial counsel was ineffective, because he failed to object to the admission of evidence pertaining to the dismissed count; (3) trial counsel was ineffective, because he failed to investigate the victim's criminal record adequately in order to impeach her at trial; (4) the prosecutor withheld evidence regarding the victim's criminal record from the defense, and the trial court allowed the prosecution to do so; (5) trial counsel was ineffective, because he revealed Petitioner's defense to the prosecutor before trial; (6) trial counsel was ineffective, because he told the jury that Petitioner was a "nasty drunk" and improperly conceded that Petitioner had made the threats which were the basis of the charge; (7) trial counsel was ineffective, because he failed to impeach the victim when she committed perjury; (8) trial counsel was ineffective, because he failed to object or request a mistrial when the prosecutor revealed to the jury that Petitioner was on parole; (9) trial counsel failed to involve Petitioner in the preparation of the jury instructions, and as a result, Petitioner was prejudiced when the trial court instructed the jury regarding the

1 uncharged offense of aggravated assault; and (1) the Three Strikes law
2 violates the Eighth Amendment on its face and as applied to Petitioner.¹
3

4 On May 25, 2003, Judgment was entered denying the First Action
5 petition on its merits and dismissing the First Action with prejudice.
6 Petitioner appealed. On June 1, 2007, the United States Court of
7 Appeals for the Ninth Circuit denied a certificate of appealability
8 (Case No. 06-55961).²
9

10 In this action, Petitioner again seeks Section 2254 habeas relief
11 based on this same 1999 state conviction. Petitioner has not stated the
12 specific basis or bases on which he contends that he is entitled to
13 federal habeas relief with respect to his 1999 conviction, other than to
14 allude, without explanation, to "newly discovered evidence." Petitioner
15 appears to: complain that the California Supreme Court should not have
16 denied his most recent habeas petition on the ground that it was
17 untimely (see Petition at 6-7, Ex. C); contend that he has a due process
18 right to present claims challenging his 1999 conviction free of
19 procedural requirements and constraints (see *id.* at 6); and argues that
20 the AEDPA, including its statute of limitations, is unconstitutional,
21 because it only applies to prisoners and impedes his ability to seek
22 federal habeas relief (see *id.* at 5-6). Petitioner admits that he has
23 not raised any of the claims asserted in the Petition in the state
24

25 ¹ Pursuant to Rule 201 of the Federal Rules of Evidence, the
26 Court takes judicial notice of its records and files in Petitioner's
previous action filed in this district.

27 ² Pursuant to Rule 201, the Court also takes judicial notice of
28 the electronic dockets for the Ninth Circuit available through the PACER
system.

1 courts. (Petition at 5-7.)

2
3 **DISCUSSION**

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5 The Petition, admittedly, is fully unexhausted and subject to
6 dismissal for that reason. See 28 U.S.C. § 2254(b)(1)(A); Rose v.
7 Lundy, 455 U.S. 509, 518, 102 S. Ct. 1198, 1203 (1982); Fields v.
8 Waddington, 401 F.3d 1018, 1020 (9th Cir. 2005) ("We may review the
9 merits of Petitioner's habeas petition only if he exhausted state court
10 remedies."). The Petition, however, must be dismissed based on a more
11 fundamental, and jurisdictional, defect.

12
13 State habeas petitioners generally may file only one federal habeas
14 petition challenging a particular state conviction and/or sentence.
15 See, e.g., 28 U.S.C. § 2244(b)(1) (courts must dismiss claim presented
16 in second or successive petition when that claim was presented in a
17 prior petition) and § 2244(b)(2) (with several exceptions discussed
18 *infra*, courts must dismiss a claim presented in a second or successive
19 petition when that claim was not presented in a prior petition). "A
20 habeas petition is second or successive . . . if it raises claims that
21 were or could have been adjudicated on the merits" in an earlier Section
22 2254 petition. McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009).

23
24 In those instances when Section 2244(b) provides a basis for
25 pursuing a second or successive Section 2254 habeas petition (described
26 below), state habeas petitioners seeking relief in this district must
27 first obtain authorization from the Ninth Circuit before filing any such
28 second or successive petition. 28 U.S.C. § 2244(b)(3). The Ninth

1 Circuit "may authorize the filing of a second or successive [petition]
2 only if it presents a claim not previously raised that satisfies one of
3 the grounds articulated in § 2242(b)(2)." Burton v. Stewart, 549 U.S.
4 147, 153, 127 S. Ct. 793, 796 (2007).

5
6 In the First Action, Petitioner sought Section 2254 relief based on
7 the same 1999 state court conviction challenged in this action, and he
8 raised ten claims that were resolved adversely to him on their
9 respective merits. Accordingly, the instant Petition, which challenges
10 the same 1999 conviction, is second or successive within the meaning of
11 Section 2244(b).

12
13 Critically, Petitioner has not obtained permission from the Ninth
14 Circuit to bring this second or successive Petition, as required by
15 Section 2244(b)(3).³ Permission to file a second or successive petition
16 may be granted only if Petitioner makes a *prima facie* showing that: (1)
17 the claim relies on a new, and previously unavailable, rule of
18 constitutional law, which the Supreme Court has ordered be made
19 retroactive to collateral proceedings; or (2) the factual predicate of
20 the claim could not have been discovered earlier through the exercise of
21 due diligence, and the facts alleged, if proven, would be sufficient to
22 establish by clear and convincing evidence that, but for the
23 constitutional error claimed, no reasonable fact-finder would have found
24 Petitioner guilty. See 28 U.S.C. § 2244(b)(2)(A)(B) and (3)(C); McNabb,

25
26 ³ The Court's review of the Ninth Circuit's electronic dockets
27 available through the PACER system shows that Petitioner's appeal of the
28 First Action dismissal, as well as his appeals in three prisoner civil
rights actions (Nos. 06-15381, 08-16482, and 09-16795), are the only
Ninth Circuit actions he has brought, and he has **not** filed any Section
2244(b) application in the Ninth Circuit.

1 576 F.3d at 1030. To pursue a Section 2254 habeas action attacking his
2 1999 conviction and/or sentence, Petitioner must persuade the Ninth
3 Circuit that one or both of these predicates exists for any claim he now
4 wishes to raise.⁴

5
6 As Petitioner has not obtained permission from the Ninth Circuit to
7 bring a second or successive petition, the instant Petition must be
8 dismissed, because this Court lacks jurisdiction to consider it. 28
9 U.S.C. § 2244(b); see also Burton, 549 U.S. at 157, 127 S. Ct. at 799
10 (district court lacks jurisdiction to consider the merits of a second or
11 successive petition absent prior authorization from the circuit court).
12 Accordingly, IT IS ORDERED that Judgment be entered dismissing this
13 action without prejudice.⁵

14
15 In addition, pursuant to Rule 11(a) of the Rules Governing Section
16 2254 Cases in the United States District Courts, the Court has
17 considered whether a certificate of appealability is warranted in this
18 case. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484-

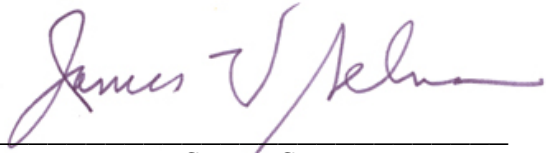
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20 ⁴ The Court notes that Petitioner's state direct appeal
21 concluded in the first quarter of 2001. Even if, *arguendo*, Petitioner
22 were to receive statutory tolling for the state habeas petitions he
23 filed that were pending in 2001-02, before he filed the Prior Action,
24 Petitioner's limitations period expired at the latest in early 2003.
25 Although Petitioner appears to argue, in the instant Petition, that he
is entitled to equitable tolling based on events commencing in 2006, his
limitations period expired several years before then. Thus, the instant
Petition appears to be substantially untimely under 28 U.S.C. §
2244(d)(1), in addition to being fully unexhausted and second or
successive.

26 ⁵ Because the Court lacks jurisdiction to consider the instant
27 Petition, it is being dismissed on that ground, rather than due to its
28 unexhausted nature. Even if Petitioner were to exhaust his claims, he
still would be required to comply with Section 2244(b) before alleging
those claims in this Court through a Section 2254 petition.

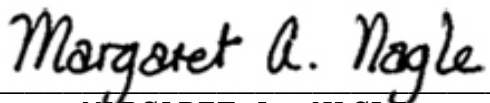
1 85, 120 S. Ct. 1595, 1604 (2000). The Court concludes that a
2 certificate of appealability is unwarranted, and thus, a certificate of
3 appealability is DENIED.

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5 IT IS FURTHER ORDERED that the Clerk serve copies of this Order and
6 the Judgment herein on Petitioner.

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8 DATED: April 30, 2010.

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10 
11 JAMES V. SELNA
12 UNITED STATES DISTRICT JUDGE

13 PRESENTED BY:

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15 MARGARET A. NAGLE
16 UNITED STATES MAGISTRATE JUDGE
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